

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

In re:

MERIDIAN SUNRISE VILLAGE, LLC,  
Debtor.

MERIDIAN SUNRISE VILLAGE, LLC,  
Plaintiff,

v.

NB DISTRESSED DEBT INVESTMENT  
FUND LIMITED, et al.,  
Defendants.

Appeal No. 13-05503 RBL

Bankruptcy No. 13-40342-BDL

Adversary No. 13-04225-BDL

ORDER DENYING FUNDS'  
MOTION TO VACATE

[Dkt. #51]

THIS MATTER is before the Court on the Funds' Motion to Vacate the Judgment Affirming the Bankruptcy Court's Preliminary Injunction and Confirming the Debtor's Reorganization Plan [Dkt. #51]. The Motion is based on Rule 60(b) and the Funds' contention

1 that, after the judgment, it discovered that a portion of the factual basis for this Court's decision  
2 was false.

3 The Funds argue that two of debtor Meridian's officers (Corliss and Waiss) previously  
4 claimed that they negotiated the Loan Agreement's terms regarding the assignment of the loan to  
5 "Eligible Assignees." Corliss and Waiss also claimed that they were motivated to limit the  
6 eligible assignees (and to preclude assignment to entities like the Funds) by a previous negative  
7 experience with assignment to a non-institutional lender, and did not want to have to negotiate  
8 the fate of the Project with an entity like the Funds.

9 The Funds claim that post-judgment discovery<sup>1</sup> has demonstrated that (1) no one from  
10 Meridian "negotiated" the "Eligible Assignee" term, and (2) Corliss' prior "negative experience"  
11 did not actually involve the assignment of his loan to a non-institutional lender. It argues that  
12 this Court specifically relied on the veracity of testimony to the contrary, and that, based on this  
13 new evidence, the Court should vacate its prior rulings.

14 Meridian argues that, in context, Corliss' claim that he was involved in the negotiation of  
15 the Loan Agreement is not inconsistent with his deposition testimony that he "did not negotiate  
16 the documents." It also argues that the accuracy of Corliss' recollection about the prior negative  
17 experience is not relevant; whatever the impetus was, he did not want the loan to be freely  
18 assignable to entities like the Funds.

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22 <sup>1</sup> This Court affirmed the Bankruptcy Court's preliminary injunction precluding the  
23 Funds from voting on Meridian's Reorganization Plan, and the Bankruptcy Court's subsequent  
24 confirmation of that Plan. The underlying adversary proceeding is apparently ongoing, and is  
scheduled for trial in the Bankruptcy Court on May 15, 2014.

1 As an initial matter, the Funds' Motion over-emphasizes the import of Corliss' and  
2 Weiss' prior testimony. Their claims about *how* the definition of "Eligible Assignees" came to  
3 be part of the Loan Agreement, and *why* they wanted the Loan Agreement to preclude  
4 assignment to entities like the Funds, was not the primary, or even the secondary, basis for the  
5 Court's prior rulings. These claims added context, to be sure, but the testimony was not used to  
6 "show an intention independent of the instrument or to vary, contradict or modify the written  
7 word." *See Hearst Communications, Inc., v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d  
8 262 (2005).

9 Instead, the most compelling evidence of the parties' intent was the language they used in  
10 the Loan Agreement:

11 "Eligible Assignee" means any Lender or any Affiliate of a Lender or any commercial  
12 bank, insurance company, financial institution or institutional lender approved by Agent in  
13 writing and, so long as there exists no Event of Default, approved by Borrower in writing,  
14 which approval shall not be unreasonably withheld.

15 Loan Agreement at §1.1. As this Court explained in its Order on the Funds' Emergency Motion  
16 for Leave to Appeal and for Stay [Dkt. #15], the Funds' broad reading of the term "financial  
17 institutions" rendered the remaining limitations meaningless—read as they suggested, there was  
18 no practical limitation on the assignment of Meridian's loan, at all. The language used, alone,  
19 warranted the result reflected in this Court's prior ruling, and nothing in the current Motion  
20 changes that analysis.

21 The second most compelling fact—one that bolstered the Court's reading of the language  
22 used, but did not alter it—was that US Bank actively sought Meridian's agreement to waive the  
23 assignment limitations in late 2012, because it claimed that the restriction was hampering its  
24 efforts to sell the Loan. This conduct demonstrated rather clearly that US Bank read the Loan

1 Agreement's Eligible Assignee provision<sup>2</sup> as Meridian did, and as the Court did—that it was in  
2 fact a limitation, and that the Funds were not Eligible Assignees under the agreed-upon  
3 definition of that term.

4 The Funds' claim that Corliss and Waiss misled the Court does not warrant the relief they  
5 seek under Rule 60(b). The Funds' articulation of the Rule 60 standard is correct:  
6 Rules 60(b)(1), (2), (3), and (6), respectively, allow for relief from judgment based on mistake,  
7 newly discovered evidence, fraud or misrepresentation, or any other reason justifying relief.  
8 Relief from judgment under Rule 60(b) is appropriate to correct judgments that rely on false or  
9 misleading testimony. *See* Fed. R. Civ. Pro. 60(b); *In re Levander*, 180 F.3d 1114, 1120 (9th Cir.  
10 1999).

11 First, the "new evidence" does not establish that Meridian misled the Court. The shading  
12 is different, undoubtedly, but the gist of Meridian's principal's claim—that they sought and  
13 received a limitation on the assignability of the Loan—is not undermined by the fact that they  
14 did not actually exchange alternating drafts with their lender. There is evidence that other  
15 Corliss/Investco loans with US Bank did not include similar language. It is possible that  
16 Meridian asked for a limiting term before the documents were drafted and an acceptable term  
17 was included in the first draft.

18 Similarly, the fact that Corliss' "negative experience" 20 years ago did not actually  
19 involve an assignment does not warrant this Court's reversal of its prior Orders. That testimony  
20 was offered only as an explanation for why Meridian wanted to limit Loan assignment. But  
21 whatever the reason, the fact is, Meridian wanted the limitation. And whether it wanted it or not,

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23 <sup>2</sup> If, as the Funds now claim, Meridian had nothing to do with this language, then US  
24 Bank necessarily drafted it. And its own contemporaneous conduct demonstrates that it knew  
exactly what the language meant.

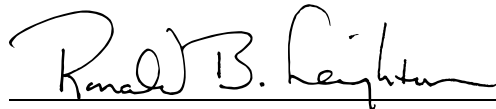
1 the Loan Agreement included a term that did limit assignment. The accuracy of Corliss'  
2 recollection is not relevant, and it played no substantive role in this Court's prior rulings.

3 Finally, and in any event, the challenged testimony does not warrant a different  
4 interpretation of the actual contract language. Even if that testimony was flatly wrong, it was not  
5 the basis for the Court's interpretation of the language used in the Loan Agreement. That  
6 language alone was sufficient for the determination that assignment to entities like the Funds was  
7 not permitted.

8 The Court will not vacate its prior decisions under Rule 60. The Funds' Motion is  
9 DENIED.

10 IT IS SO ORDERED.

11 Dated this 30<sup>th</sup> day of April, 2014.

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14 RONALD B. LEIGHTON  
15 UNITED STATES DISTRICT JUDGE  
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